SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

SBCA

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TO: Ms. Magalie Roman-Salas

FROM: Rachel Zink
Executive Assistant

DATE: August 9, 1999

SUBJ: SBCA FCC Filing

Enclosed are nine copies and the original copy of the Satellite Broadcasting and Communications Association's Notice Of Inquiry comments regarding the Status of Competition in Markets for the Delivery of Video Programming. Five of the nine copies have been specifically designated for the Commissioners.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the	)	
Delivery of Video Programming	)	

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COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

Satellite Broadcasting and
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In the Matter of	)	
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Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)))	CS Docket No. 99-230

NOTICE OF INQUIRY

COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

I. INTRODUCTION.

The Satellite Broadcasting and Communications Association ("SBCA") is pleased to submit to the Commission its comments in the above-referenced proceeding. The SBCA has participated annually in the Commission's request for comments on the state of competition in the video marketplace ever since the Commission has been required to conduct this assessment by the 1992 Cable Act. As we will demonstrate, the Direct-To-Home ("DTH") satellite industry has made significant progress since the SBCA filed comments in the Commission's initial Notice of Inquiry which was required by the 1992 Cable Act. While it is apparent that the industry has become the chief candidate for offering truly effective competition to cable, certain regulatory changes continue to be necessary before DTH satellite can become the meaningful competitor for which both policy makers and regulators have hoped.

The SBCA, as the Commission well knows, is one of the few national trade associations which represents all of the various segments of which the industry is comprised. The Association's membership includes both forms of DTH satellite distribution: the venerable C-Band service which offers approximately 250 program channels (both scrambled and in the clear) and which appears to be most popular among viewers who have most likely been C-Band subscribers before the advent of DBS; and the DBS service which has been in existence for slightly more than five years, and in that period has gained remarkable and well-deserved acceptance by large numbers of video consumers. SBCA membership also includes the major program services which supply news, sports, entertainment, movies, premium and special programming to both C-Band and DBS providers; the manufacturers of state-of-the-art home satellite receiving equipment; C-Band "program packagers;" and distributors, retailers, marketing cooperatives and mass merchandisers who supply consumers with DTH receiving equipment, and often programming, at point of sale.

The DTH industry continues to face significant watershed events at the time of submission of these comments. In accordance with the orders of the U.S. District Court in Miami, together with certain agreements negotiated between several DTH service providers and the television broadcast industry, upward of 2 million DTH households stand to lose their distant network signals by the end of 1999. The termination of service for consumers who are predicted to receive a signal of Grade A intensity was scheduled to be completed on July 31, 1999, with households predicted to receive a signal of Grade B intensity scheduled to be completed on December 31, 1999. Nonetheless, in spite of the predicted signal intensity at these households, a significant number of them cannot receive a viewable, off-air signal with an outdoor antenna. This issue has become a major preoccupation of both the DTH industry and Congressional lawmakers who are currently engaged in a Conference Committee on new satellite legislation. The bills under consideration also authorize local-into-local satellite service - an important component of any video service which is designed to compete with cable. Implementation of local-into-local service could alleviate the distant network signal issue to an extent. However, as local-into-local will not be available to all local markets, distant network signals will remain a very important program component for a large portion of DTH consumers.

II. THE DTH INDUSTRY IS CHANGING.

At the time of the initial NOI in this matter, the Direct-To-Home satellite industry ("DTH") was comprised solely of C-Band home satellite subscribers. That portion of the DTH industry gained its initial popularity in the early to mid-1980's prior to the commencement of scrambling by the major program services. Following a difficult transition to an orderly subscription video marketplace - which included the ferreting out and eradication of sophisticated signal theft activities (which SBCA has commented on extensively in previous competition assessments) - C-Band became the viewing choice of television "aficionados" because of the array of both subscription and in-the-clear services which were available. Since then however, the acquisition and use of C-Band systems has been declining steadily as we have previously reported. Monthly subscriber data compiled by the *SkyTRENDS* program[1] shows that C-Band subscribership is now below 2 million. That reflects net declines each month even though C-Band sales continue. The following chart indicates those declines on an annual basis.

	C-Band Subscribers	Net Change
June 30, 1994	1,922,808	
June 30, 1995	2,321,349	20.7%
June 30, 1996	2,336,933	0.07%
June 30, 1997	2,184,472	(6.5%)
June 30, 1998	2,028,225	(7.2%)
June 30, 1999	1,783,411	(12%)

Most notably, the last significant increase for C-Band occurred in 1994-1995, the year that DBS was introduced. Since then, however, it has extant core of subscribers will allow the C-Band service to continue as a viable business for the foreseeable future. Given the static but dedicated level of subscribers, the

[1] *SkyTRENDS* is a joint venture marketing, research and conference program between SBCA and Media Business Corp, Denver, CO. It is the leading supplier of economic information and subscriber data for the DTH industry; publisher of the authoritative newsletter *SkyREPORT*; and sponsor of the twice yearly *SkyFORUM* trade and financial conferences. *SkyTRENDS* also offers DTH satellite subscriber data through its Effective Competition Tracking Reports program which is available to cable operators interested in gauging competition in their service areas.

service has become a niche distribution medium served by a single encryption supplier and a relatively small number of "program packagers." It is further bolstered by the duration of existing C-Band transponder leases, many of which extend into the middle of the next decade. In addition, the demand for transponder space remains exceptionally strong and increases in leasing costs accompany that demand. But it has always been clear that the C-Band service by itself - in spite of its plethora of available programming and quality of service - is constrained by the size of its receiving equipment from having a realistic opportunity to achieve the urban and suburban penetration that is needed to offer like competition to cable operators.

It has been the DBS providers who have jump started competition to cable well beyond what C-Band had been able to achieve. In the short five years that DBS service has been available to the public, viewers have shown strong preferences for the quality, value and service that this distribution medium has to offer. The rate of subscriber acquisition has been occurring at increasing velocity as is demonstrated by the subscriber tables in the following section that illustrate net gains in subscriber growth on a relative basis.

DBS distribution has also been characterized by significant moves towards consolidation. Earlier this year, DIRECTV acquired U.S. Satellite Broadcasting Company, Inc., including USSB's frequencies at the 101 degrees W.L. and 110 degrees W.L. orbital locations and distribution rights to certain premium programming which heretofore had been sold solely under the USSB banner. DIRECTV subsequently acquired the assets of Primestar Partners, LP and the DBS authorization of Tempo Satellite, Inc. thereby gaining an additional 2 million subscribers and 11 frequencies at the 119 degrees W.L. orbital location. In addition, Echostar acquired the satellite assets at 119 degrees previously owned by MCI. These moves have enabled the DBS providers to offer more efficient and effective competition to cable.

III. DTH SUBSCRIBER GROWTH CONTINUES APACE.

Overall DTH subscriber growth is progressing rapidly with net acquisition figures outstripping those of previous years. Of particular note is the change in peak sales periods. Traditionally DTH sales have been seasonal, showing the strongest upticks from September to December of each year. That pattern may be changing. The monthly sales data reported by *SkyTRENDS* suggest that monthly sales may be running on a more consistent basis, irrespective of calendar periods.

DTH Subscriber Base[2]

	Total DTH	Total DBS	Total C-Band
June 30, 1994	1,992,808	70,000	1,922,808
June 30, 1995	3,424,349	1,103,000	2,321,349
June 30, 1996	5,237,933	2,901,000	2,336,933
June 30, 1997	7,231,472	5,047,000	2,184,472
June 30, 1998	9,282,394	7,254,169	2,028,225
June 30, 1999	11,861,411	10,078,000	1,783,411

Percent Growth (Loss) June 30-June 30

94-95	71.84%	1,475.71%	20.73%
95-96	52.96%	163.01%	0.67%
96-97	38.06%	73.97%	(6.52%)
97-98	28.36%	43.73%	(7.15%)
98-99	27.83%	38.93%	(12%)

New Subscribers/Day June 30-June 30

94-95	3,922	2,830	1,092
95-96	4,969	4,926	43
96-97	5,462	5,879	(418)
97-98	5,619	6,047	(428)
98-99	7,066	7,737	(671)

[2] All subscriber data has been adjusted to account for "churn" not previously reported.

The tables offer some interesting perspectives on satellite television growth. While the gross percentage increases in subscribers naturally get smaller as the basis against which they are measured becomes larger, the data provides other, more significant indicators regarding the acceptance of satellite TV. First, net DBS/sales per day for 98-99 shows a significant jump over the previous data period: 7,737 compared to 6,047. Our most recent data indicate that for the first six months of 1999, the daily DBS sales rate has increased further, to 8,333. Both DIRECTV and Echostar now log in consistently more than 100,000 new subscribers each per month. Based on the statistics for the first six months of this year, we anticipate a gross increase of 3 million subscribers for DBS in 1999, compared to approximately 2 million for the two previous, annual computation periods.

An increase in the total household penetration for DTH is also reflected in the study. Where slightly more than three years ago only four states showed DTH penetration of TVHH's at more than 10 percent, the July 1 statistics indicate that 40 states now have DTH penetration of over 10 percent; 10 states showed a penetration of over 20 percent; and two states, Montana and Vermont, logged more than 30 percent. DTH is now viewed in approximately 12 percent of TVHH's. (See Appendix A.)

IV. DTH SATELLITE CONSUMER DEMOGRAPHICS.

Each year, the SBCA, through its Market Research Task Force, conducts extensive consumer surveys of existing satellite television subscribers. This year, the SBCA expanded the groups surveyed by The Yankee Group to include new consumer bases which had not been surveyed in the past.[3] They included new DBS subscribers who owned their systems for three months or less; a general consumer survey on market awareness of multichannel video services; and the traditional DBS and C-Band subscriber studies.

While we have reported in the past the results of similar surveys, those performed in 1999 corroborate the earlier findings from previous years - namely that consumers who select DTH satellite as their television viewing method find it superior to any other video service available in the marketplace. As the Yankee Group states in its "Implications" to the DBS Study, "As we saw last year, while this group of DBS subscribers are beyond 'the romance period' with their service, they continue to feel very positively about it. 86% of DBS subscribers rate the overall quality of their service as excellent or good, and 87% of DBS subscribers are 'very' or 'somewhat' likely to recommend their satellite service to a friend. As more households get DBS this positive word-of-mouth can only be beneficial." We now proceed to some of the more detailed findings from the studies.

A. DTH Penetration.

In 1997, we reported that of all DTH consumers surveyed, 44 percent reported that cable was available to them. The 1998 consumer study revealed that the total DTH universe passed by cable had grown to 53 percent, with DBS

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[3] Multi-Channel Video Market Study, 1999; New DBS Subscriber Study, 1999; DBS Subscriber Study, 1999; C-Band Subscriber Study, 1999, prepared for the SBCA by The Yankee Group, February-June, 1999.

users reporting 55 percent passed, and C-Band, 45 percent. The Yankee Group's 1999 studies show further increases: 60 percent of DBS subscribers reported being passed by cable, while only 38 percent of C-Band subscribers reported having cable available. Of those numbers, 24 percent of DBS subscribers also subscribed to cable, while 14 percent of C-Band consumers reported the same. Last year's Yankee Group study indicated that DBS subscribership to cable was about the same, but 10 percent of C-Band households took cable service. (See Appendix B.)

In connection with these demographics, there may be some subtle changes which have taken place. For example, it is useful to note that the number of C-band households which have cable available to them has decreased (from 45 to 38 percent). Interestingly enough, 77 percent of the C-Band subscribers interviewed told The Yankee Group that they resided in a rural area, while 60 percent of DBS subscribers reported a similar condition. (See Appendix C) While more demographic information may be needed to make some precise correlations, the decrease in number of C-Band households passed by cable could be attributed to losses of C-Band subscribers in suburban areas to DBS. Thus C-Band is taking on an even greater rural component as is evident by the further lack of cable service, coupled with more than three-quarters deeming themselves rural.

With 60 percent of DBS subscribers also describing themselves as rural, it is fair to continue to describe DTH as a predominantly rural, or even semi-rural, service. Some interesting conclusions can be drawn from this. The first is that, in view of these data, there appears to be a significant suburban/urban market which remains untapped by DBS, and that remains the exclusive domain of cable operators. However, to access that market on a competitive basis, DBS needs the authority to deliver local-into-local broadcast programming. That need is further highlighted by the emphasis on local channel programming by the DTH subscribers interviewed for the study.

B. Local Television Channels.

DTH subscribers interviewed by The Yankee Group stressed the importance of local broadcast signals, with 81 percent of DBS households and 77 percent of C-Band households reporting that local signals were very or somewhat important. While, as last year, the predominate means of receiving local broadcast signals by all DTH subscribers was by external or internal TV antennas, 14 percent of C-Band homes and 9 percent of DBS homes reported that they do not receive local channels at all. (See Appendix D) We believe that the importance of local broadcast signals reported by interviewed households, coupled with the penetration data, is an indicator that DTH, and DBS in particular, may be just at the threshold of becoming a viable alternative to cable. Based on sheer numbers, acceptance of satellite television technology has been very high - in spite of the fact that local broadcast signals are still not available to DTH subscribers on a meaningful basis. The fact that a relatively significant number of DTH viewers do not get any local signals whatsoever should be an important indicator to both broadcasters and the Commission alike.

C. DTH Service and Quality.

DTH subscribers continue to show very strong affinity with their satellite systems, more so than any other consumer service. For DBS subscribers, 90 percent rated the overall quality of their satellite system as "excellent" or "good;" 96 percent gave picture quality similar ratings; and 95 percent gave an "excellent" or "good" to sound quality. In the C-Band study, subscribers gave ratings for the same three categories of 87 percent, 91 percent, and 93 percent respectively. Thus, consumer satisfaction remains strong. (See Appendix E)

As it did last year, The Yankee Group also asked respondents to rate DTH service alongside other telecommunications services and utilities. Again, both DBS and C-Band continued to have the highest comparison ratings. Mean ratings by service providers were based on a scale of 5=excellent and 1=poor. DBS consumers gave their providers a rating of 4.22 and C-Band households 4.33 - again higher than any other service that was rated. Electric companies also received a rating above 4.0, but cable operators were given a 3.39 from C-Band homes and 2.89 from DBS subscribers. Last year, cable received 3.1. Satisfaction ratings of all services appear to be similar to last year's with the exception of cable's lower rating. (See Appendix F)

V. REGULATORY ISSUES HINDER COMPETITION.

The growth rate of DTH and the consumer testimonials to the value and quality of the technology speak to the vast potential of DTH to become a stronger competitor to the cable monopoly. In spite of the seemingly rapid growth of DBS, major issues that have yet to be resolved continue to hamper the industry and prevent it from realizing its full potential. We continue to work to persuade Congress and the FCC to address these issues in ways that are consistent with the infrastructure of satellite home delivery from a single, national platform. This characteristic sharply distinguishes the DTH industry from cable, which is in most cases a local monopoly serving subscribers via wired plant.

Cable has significant advantages. Today's average television viewer is likely to have grown up with cable, and a rooftop television antenna may seem to be an obsolescent technology. The effectiveness of DTH-restrictive municipal ordinances and home owner association rules (now to some extent pre-empted by the FCC) can be partly credited with the cultural penetration that cable has made, resulting in its acceptance by consumers as the "normal" means of watching television.

The process of acquiring satellite TV is markedly different from cable. Cable performs most typically as a local utility, and any household that is passed by a cable wire has access in return for a (sharply increasing) fee. To gain access to DTH service, consumers must acquire (including leasing) their own system and contract directly with the platform provider for the program package that best suits their needs. Therefore, a satellite consumer does not have the ease of tapping into a wire, but has the advantage of always being "passed" by a satellite footprint in the continental U.S.

The solid growth enjoyed by DTH satellite television is evidence that the industry has begun to change consumer attitudes. This change is made more difficult by the regulatory obstacles to its growth. The industry's success so far points to the desirability of the technology, the strength of consumer demand, dissatisfaction with cable service, or most probably a combination of the three. However, public policy makers must be persuaded that even though this growth has occurred, the potential for even better performance by the industry rests on its ability to overcome serious regulatory barriers.

A. General Copyright Reform: To give consumers the choice and competition they need, there are five principal copyright and commerce issues that must be addressed. They are: 1) Inequity in the duration of the copyright license between the permanence of the cable license and the temporary nature of the DTH license; 2) The anti-competitiveness of the statutory provision requiring a cable subscriber who becomes a satellite television subscriber to wait 90 days to receive distant network signals; 3) The disparity in copyright fees between DTH and cable; 4) The need to resolve the highly contentious "white area" consumer crisis; and 5) The need to authorize satellite providers to retransmit local television signals back into local markets (local-into-local), and to tailor that service to satellite's national format. At the time of the submission of these remarks, both the House of Representatives and the Senate have passed Satellite Home Viewer Act (SHVA) reform legislation, and a House-Senate conference committee is working to reconcile the bills. Both the House and Senate bills eliminate the 90 day cable provision, but only extend the DTH copyright license for five years.

1. The "White Area" Consumer Crisis: Nothing illustrates more starkly how the SHVA fails to encourage effective competition between satellite providers and the cable monopoly than the recent consumer crisis produced by the rulings of a federal court in Miami. The court ordered the termination of distant network signals to millions of consumers all over America, many of whom do not receive an acceptable local network signal with a conventional rooftop antenna.

By enacting the SHVA, Congress recognized that there are many Americans who, because of interference, the distance they live from a broadcast tower, or because their reception is blocked by hills, mountains, or even tall buildings, cannot receive an acceptable network signal using a conventional rooftop antenna. Congress intended to permit those consumers to receive distant network service via satellite.

Nonetheless, the genesis of the current crisis lies in the SHVA definition of "unserved household" that is the key to whether or not a consumer is eligible to receive network signals via satellite. The statute defines such a household as one that,

> "(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network."[4]

On July 10, 1998, a federal district court judge in Miami, Florida issued a preliminary injunction, and on December 30, 1998, the same court entered a permanent injunction that prohibits affected satellite television providers from selling CBS and Fox network signals to customers who the order declares are not "unserved households" because they are predicted to receive signals of Grade B intensity. Satellite providers must terminate distant network signal service to consumers if they cannot actually receive an acceptable local network signal over-the-air using a conventional rooftop antenna.

Americans who cannot receive an acceptable local network signal over the air are legally entitled under the SHVA to receive distant network signals via satellite and termination of those signals is a violation of their rights under the statute. Nonetheless, as a result of the Miami court's rulings, many Americans have unfairly lost, or will soon lose the distant network signals they have been receiving via satellite. Many others have been and will continue to be unfairly denied the opportunity to purchase those signals. Some, especially those in rural areas of the country, will be left with no access to network service of any kind.

On February 28, 1999, over 700,000 consumers who were authorized for distant network service via satellite after March 11, 1997, lost that service. As a result of the permanent injunction entered by the Miami court, an additional 1.5 million subscribers who have continuously received distant network signals via satellite since before March 11, 1997, were scheduled to lose those signals on April 30, 1999. Because of an agreement between some satellite providers and the broadcasters, the termination of signals to those subscribers predicted to

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[4] Satellite Home Viewer Act of 1988, P.L. 100-667, Section 119(c)(3)(D)(i).

receive signals of Grade A intensity was not required to be completed July 31, 1999, and the termination for those subscribers predicted to receive signals of Grade B intensity has been delayed until December 31, 1999.

FCC Chairman William Kennard called this consumer crisis a "train wreck that need not occur." When the FCC issued its Notice of Proposed Rulemaking on the white area crisis, consumers and the industry hoped that the FCC would resolve the problem. Unfortunately, in spite of the FCC's sincere effort to aid satellite consumers under limited time constraints, its December 1998 Report and Order will help very few consumers. In that Order the FCC acknowledged that eligible consumers will unfairly lose their distant network signals, but also determined that it does not have sufficient authority under the Satellite Home Viewer Act to remedy the problem.

Given the FCC's ruling, only Congress can resolve the white area consumer crisis. At the time of filing these remarks, Congress is working on SHVA reform legislation that has the potential to enhance competition.

a. Local Into Local: In its Report and Order, the FCC stated that competition to cable could be greatly enhanced if Congress would permit satellite providers to retransmit local signals back into local television markets (local-into-local). Both versions of SHVA reform legislation that have passed the House and Senate emphasize that local-into-local service will enhance competition and resolve in part the white area consumer crisis.

If, as expected, the final bill that emerges from the House-Senate Conference Committee grants the DTH industry authority to provide local-into-local service it will greatly enhance competition in those markets served by local-into-local. Nonetheless, because of cable's current vast local market power, satellite providers will most likely continue to face marketplace disadvantages in complying with rules more burdensome than cable's. When the 1992 Cable Act took effect, cable had 58 million local subscribers. By contrast, satellite, prohibited from delivering local television signals, has very few. Therefore, it is critically important that Congress avoid the immediate application of cable-like rules to satellite, or it will limit the industry's ability to compete effectively. For example:

1. The bills currently provide that retransmission consent would begin immediately for satellite while cable enjoyed a 1-year forbearance before the requirement took effect. Satellite needs the same forbearance to provide sufficient time for fair negotiation of retransmission consent.

2. Cable's 58 million subscribers gave it significant bargaining power in negotiating retransmission consent agreements with local broadcasters. Because of that power, consent was free. Satellite providers are already facing costly demands in return for local television signal carriage. Satellite needs adequate protection against discriminatory pricing for retransmission consent. Excessively costly demands could make it impossible for satellite providers carry local television stations – hardly a competitive result.

3. Must-carry for satellite should not include the unnecessary carriage of duplicate signals (e.g., shopping networks) that are already carried in national program packages. This will result in unnecessary loss of satellite channel capacity that could be used to serve other markets.

b. Distant Network Signals: Consumers living in small and rural markets need the choice and competition to cable that only Direct-To-Home satellite television can provide just as much as their fellow citizens living in urban markets. Because of technological limitations, local-into-local will not be immediately available in the majority of the nation's 211 television markets via DBS technology. C-Band technology will never support the delivery of local-into-local. If Congress does not adequately address the court-imposed limitations on the delivery of distant network signals many consumers will be forced to return to the cable monopoly for network service. Many other consumers living in rural areas not served by cable will be left with no network service at all.

SBCA is urging Congress to enact the following reforms:

1. Give the FCC the authority to set a signal reception standard solely for the Satellite Home Viewer Act that will ensure that households that cannot receive an acceptable over-the-air network signal using a conventional rooftop antenna can receive distant network signals via satellite.

2. Give the FCC the authority to establish the most effective point-to-point predictive model that will enable a consumer to know with a reasonable degree of certainty whether or not he or she will be able to receive an acceptable local network signal over-the-air using a conventional rooftop antenna. To enable consumers to rely on the prediction, it should be presumed to be correct. The burden and cost of any challenge should be borne by the party challenging the presumption.

3. Protect consumers who are currently receiving distant network signals via satellite.

Even with these pro-satellite provisions satellite providers will continue to face marketplace disadvantages in complying with rules more burdensome than cable's. In recognition of this reality, and because of the infrastructure of satellite home delivery from a single, national platform we are urging Congress to recognize a few important realities to enhance competition:

1. The application of program exclusivity rules similar to cable's would severely handicap satellite distribution of distant network signals because of the technological and economic unfeasibility of implementing the rules for a national format. Satellite providers would have to monitor over 1,569 television station program line-ups and identify affected households on an individual basis. The administrative and technological burden of complying would result in the blacking out of large portions of signals on a nationwide basis because of the inherent difficulty in identifying individual households.

2. If Congress directs the FCC to establish a new signal reception standard, consumers unfairly losing distant network signals may have to wait years to have that service restored if they qualify under the new standard. Consumers need a moratorium on signal termination until the new signal reception standard is in place.

3. Distant network signals were exempt from the retransmission consent provisions of the 1992 Act because Congress recognized the need for rural viewers to have access to network programming. A change in this policy could threaten the delivery of distant network signals to consumers.

2. New Copyright Fees: The flaws in the Satellite Home Viewer Act of 1988 have been exacerbated and reinforced through an ill-advised decision by a Copyright Arbitration Royalty Panel (CARP) that recommended new, higher copyright fees for the DTH industry which were subsequently adopted by the Librarian of Congress.

The SHVA of 1994, which extended the original Act, called for a copyright fee adjustment for DTH carriers who marketed superstation and distant network signals, to be determined by a CARP proceeding conducted under the auspices of the Copyright Office.[5] DTH copyright fees prior to the 1998 CARP determination were already substantially higher than cable's. DTH carriers at

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[5] The CARP process replaced the former Copyright Royalty Tribunal that was abolished in 1993.

that time paid 6¢ per subscriber, per month for each distant network signal, and either 14¢ or 17.5¢ for each superstation signal, depending on whether or not they carried nationally cleared programming. At the time of the CARP proceeding, cable was paying an average of only 2.45¢ and 9.8¢, respectively, for the very same signals.

The 1994 Act changed the rate determination criteria for the CARP sufficiently so as to undermine what should have been the true goal of the panel: determining a rate that was comparable to the rates paid by DTH's competitor, cable. The new statute instructed the CARP to take into account what it perceived as the "fair market value" of the retransmitted broadcast signals. The Act also instructed the CARP to base its decision on "economic, competitive, and programming information" that included, among other factors,

> "(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace . . ."[6]

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[6] Satellite Home Viewer Act of 1994, P.L. 103-369, Section 119(a)(1)(B)(i).

Clearly the Act intended not to lose sight of the competitive ramifications that the CARP's new fee could embody. It directed the CARP to take into account the very competitive factors that it ultimately chose to ignore.

The CARP's decision stunned the industry. The new fee it recommended to the Librarian of Congress (who oversees the U.S. Copyright Office) was 27¢ for superstation and distant network signals alike -- a highly egregious increase for an important program commodity in the DTH (and cable) marketplace. The Librarian adopted the CARP's recommendation and implemented the new fee on January 1, 1998, despite pleas from Congress and an appeal from the SBCA carriers to do otherwise. This year, the Librarian's decision was upheld by the U.S. Court of Appeals. As a result, the satellite providers, with 10% of the market, are now paying as much or more into the satellite compulsory license pool as cable operators, with 85% of the market, are paying into the cable compulsory license pool.

Compared to the average cable copyright royalty fees, DTH is paying 270 percent more than cable for superstation signals and 1,000 percent more for distant network programming. This disparity is intolerable, particularly in view of the video competition policies that both Congress and the FCC have established with the very real hope that satellite TV will produce a strong challenge to the entrenched cable monopoly.

In the current Congressional debate over reauthorization of the SHVA both the House and Senate have passed separate bills that would reduce satellite compulsory copyright fees, but would not provide parity between the industries. Despite the fee reductions, satellite would continue to pay substantially higher copyright royalties than cable. Cable will continue to pay on average 2.45 cents for distant network signals and 9.8 cents for superstations. The "discounted rate" for satellite will be 14.85 cents and 18.9 cents, respectively, for the same signals. This disparity in rates would remain a significant impediment to effective competition.

B. Interference In the 12GHz Downlink Band: If DBS is to offer effective competition, it is critical that the FCC maintain its historic role in protecting a clear 12GHz frequency band – the primary downlink spectrum used by DBS.

A united DBS industry continues to fight a petition filed by Northpoint Technology, Ltd., and its related companies Broadwave USA and Diversified Communication Engineering, Inc., to modify Section 101.147 of the Commission's rules. Northpoint proposes to introduce a terrestrial point-to-multipoint microwave service on a secondary basis into the 12.2-12.7 GHz bandwidth that is currently allocated for exclusive use by the DBS service.

The DBS industry would welcome a workable plan that would provide consumers with an additional source of local broadcast signals. Unfortunately, Northpoint's plan poses a dire threat of interference to the receipt of DBS programming by millions of DBS subscribers. Such interference would have a very negative impact on DBS in the market and reduce the industry's ability to provide competition to cable. This is simply unacceptable.

In addition to the Northpoint threat, SBCA and its member companies continue to be concerned about similar threats of interference from proposed NGSO FSS systems such as SkyBridge and Virtual Geosatellite, which also propose to use the 12 GHz DBS downlink band.

When the Commission first allocated the bandwidth to DBS it was already dedicated to terrestrial microwave (Fixed Service). After considering proposals to allow sharing of frequencies between services the FCC rejected such proposals because of the potential that microwave would interfere. The Commission determined that DBS should be allowed to grow without interference and thus offer consumers a competitive video choice. This is a wise policy position which the Commission should respect and maintain.

To protect and encourage competition, the FCC should to deny Northpoint's petition and any other proposal to share the DBS bandwidth until the petitioner has proved that its technology can operate without causing interference to existing and future DBS services to consumers.

C. Program Access: In the 1992 Cable Act, Congress recognized that effective competition to cable is dependent upon providing non-cable MVPDs with access to programming controlled by market dominate cable operators and their vertically integrated programming affiliates. Congress directed the Commission to prevent cable operators from restricting the availability of programming or charging non-cable MVPD's discriminatory prices for the product. Without these protections, incumbent cable operators would be able to deny or restrict access to critical programming and defeat effective competition.

Because these protections are necessary for the establishment of a competitive multichannel video marketplace, SBCA advocates that they be extended until 2007 and that they be extended explicitly to programming that is terrestrially delivered.

SBCA is particularly concerned that recent rulings by the Commission mark a weakening of commitment to a competitive marketplace. The Commission has recently refused to enforce the program access rules when satellite cable programming that has been moved to a terrestrial delivery mode for the purpose of evading the law.[7] This "terrestrial evasion" coupled with a refusal to sell such programming to MVPD competitors threatens to undermine the program access rules.

D. Zoning and Covenants: The progress that the Commission has made in implementing and enforcing the zoning and covenant rules mandated by the 1996 Telecommunications Act has been valuable. In the short time the rules have been in effect they are helping to create a more competitive video environment. We commend the Commission for its work in this area.

Last year, the FCC's Cable Services Bureau issued a comprehensive Order on Reconsideration of its Section 207 zoning and CC&R preemption ruling.

While the Bureau reaffirmed its earlier decision not to prohibit all restrictions on a viewer's ability to install and maintain television reception

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[7] *See DIRECTV, Inc. V. Comcast Corp., et al*, DA 98-2151, Memorandum Opinion and Order (rel. Oct. 27, 1998); *Echostar Communications Corp., v. Comcast Corp., et al.* DA 99-235, Memorandum Opinion and Order (rel. Jan. 26, 1999).